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In the Supreme Court of the United States

OCTOBER TERM, 1981

FEDERAL BUREAU OF INVESTIGATION AND THE UNITED STATES DEPARTMENT OF JUSTICE, PETITIONERS

v.

HOWARD S. ABRAMSON

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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1. Respondent and Amicus Curiae Freedom of Information Clearinghouse have chosen to respond to the government's arguments largely by misstating them. Contrary to respondent's assertion, the government does not contend that the "exempt status [of particular information] passes through and remains intact in *any* recompilation of the information, regardless of the purposes for such recompilation" (Resp. Br. 9; emphasis added). And contrary to Amicus Clearinghouse's assertion (Br. 17), acceptance of the government's submission does not mean that an agency would always be free to withhold requested records on the ground that they contain information that was within a Freedom of Information Act (FOIA) exemption when it was first collected by the agency. Our argument is much narrower. We contend only that information that is initially

recorded for a law enforcement purpose and that falls within one of the six categories specified within Exemption 7 does not *necessarily* lose its exempt status when it is copied from one document into another document that is created for a non-law enforcement purpose.

There may often be circumstances in which the information, out of its original context, loses the character that originally brought it within the protection of Exemption 7. For example, information assembled about an individual in connection with a criminal investigation may be exempt in its original form because its disclosure would "interfere with enforcement proceedings" or "constitute an unwarranted invasion of personal privacy" (*e.g.*, by identifying an innocent individual as someone being investigated in the course of a criminal case). The same information, however, stripped from its original context and included in a document prepared for purposes other than law enforcement, might well be disclosable without interfering with a law enforcement proceeding or invading personal privacy; and if this were so, the exempt status of the information in its original form obviously would not survive. Thus, as we explained in our opening brief (Br. 15-16 n.5), our position is consistent with the proposition, illustrated by *NLRB* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 148-154 (1975), that the exempt status of material *may* be altered when it is put to a use different from that for which it was originally assembled, if the purpose for invoking the exemption no longer exists.[1]

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[1] *Niemeier* v. *Watergate Special Prosecution Force*, 565 F. 2d 967 (7th Cir. 1977), on which respondent relies (Br. 13), is simply an application of the *Sears* Exemption 5 holding. We disagree with the analysis of *Simpson* v. *Vance*, 648 F. 2d 10 (D.C. Cir. 1980), also cited by respondent (Br. 13), but in any event it is an Exemption 6 case decided by the same circuit that issued the opinion in the present case.

Respondent correctly states (Br. 18) that *Stern* v. *Richardson*, 367 F. Supp. 1316 (D.D.C. 1973), represented what the sponsors of the 1974

In this case, the information at issue should be exempt from mandatory disclosure to respondent for the same reason it unquestionably would be exempt if respondent had requested the agency document from which the information was derived—protection of the personal privacy of individual citizens. Any difference in treatment between the two situations would be wholly unresponsive to the important concerns that underlie Exemption 7(C) and would resurrect the "woode[n] and mechanica[l]" approach to Exemption 7 (see *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214, 230 (1978)) that Congress condemned in the 1974 amendments.

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amendment to Exemption 7 believed to be a proper construction of the exemption, but *Stern* has no pertinence to the issue here. In *Stern*, the district court rejected the exemption claim because it found no proof of harm to any interest the government could legitimately protect. In this case the district court found that disclosure of the documents requested by respondent *would* harm the personal privacy interest embodied in Exemption 7(C).

Finally, respondent (Br. 12) and Amicus Clearinghouse (Br. 8) err in asserting that the government's position in this case is at odds with the analysis of Exemption 7 in the *Attorney General's Memorandum on the 1974 Amendments to the Freedom of Information Act* (1975). That Memorandum does, indeed, state (*id.* at 6-7) that the threshold Exemption 7 test is distinct from the question whether disclosure would harm protectible interests, *i.e.*, that "[o]nce it is determined that a request pertains to 'investigatory records compiled for law enforcement purposes,' the next question is whether release of the material would involve one of the six types of harm specified in clauses (A) through (F) of amended exemption 7." But we do not argue to the contrary here. We contend only that in examining a record to determine whether the threshold test is met, a court may consider whether the record was copied virtually verbatim from documents generated in a law enforcement investigation. The test, as explained in the *Attorney General's Memorandum* (*id.* at 6; emphasis added), is whether the recorded material "*reflect[s] or result[s] from* investigative efforts" into civil or criminal enforcement matters.

2. Amicus Clearinghouse erroneously contends (Br. 9) that we take issue with the proposition, stated in *Forsham* v. *Harris*, 445 U.S. 169, 185 (1980), that the FOIA "deals with 'agency records,' not information in the abstract."[2] Rather, we simply note that a "record" is not always synonymous with the physical document that contains it. A single document might contain records, or memorializations, of several different matters; and, by the same token, a single matter might be identically memorialized in two or more separate documents—by photocopying, copying by hand, or the like. We have used the term "information" to refer to that which is recorded; but our argument that information does not necessarily lose its exempt status upon transfer from one document to another may be alternatively stated as an argument that a record copied from one document into another document does not necessarily, for purposes of every FOIA exemption, become a different "record."

3. There is no merit to the suggestion of Amicus Clearinghouse (Br. 17) that the determination whether information was derived from an exempt source would be unduly onerous. The agency is likely to know the source from which it has copied sensitive information, and if it is unaware whether that information was, at some remote

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[2]This quotation is wrenched out of context. The Court in *Forsham* was concerned with an FOIA request for information that was not part of *any* "agency records"; hence, the court had no occasion to focus on the question presented here. Even so, as we note in the text, the Court's statement in *Forsham* is consistent with the government's construction of the FOIA in this case. The fact that "information," to be disclosable under the Freedom of *Information* Act, must be within an "agency record," does not mean that the focus of disclosure inquiries under the Act must be on indivisible documents rather than the information they contain. Indeed, as we noted in our opening brief (Br. 20), the requirement in the Act that "[a]ny reasonably segregable portion of a record" be disclosed compels the opposite conclusion.

point, derived from documents assembled in a law enforcement investigation, it will have no reason to invoke Exemption 7 pursuant to the theory presented here. The issue arises only when the agency knows that a record contains information copied from documents created or assembled in a law enforcement investigation and that the reasons for protecting the information from disclosure still exist.

The agency, of course, bears the burden of persuading the court, with respect to any information it wishes to withhold under Exemption 7, that (a) the information is identical in substance to the information that was compiled for law enforcement purposes in the source documents and (b) its disclosure will produce one of the six specific harms listed in Exemption 7. This claim can be substantiated either by affidavit or by the court's in camera inspection. See 5 U.S.C. 552(a)(4)(B). By comparing the documents from which the information was taken and the documents at issue, a court can, without undue difficulty, determine whether the information is the same as that collected in the original investigation. Proof of the existence of a current threat to one or more of the six specific interests protected by Exemption 7 would, of course, be presented in the same manner as in any Exemption 7 case. The facts in this case belie any notion that courts would be unable to trace requested records to their law enforcement source.

4. Respondent (Br. 7 n.4, 22) and Amicus Clearinghouse (Br. 5 n.2, 13-14) suggest that the court of appeals held that even *photocopies* of records compiled for law enforcement purposes—here, name check summaries compiled in response to White House requests made in previous administrations for legitimate security or background investigations and other records from FBI files (see page 6, note 3, *infra*)—lose their exempt status if they are attached to other documents that are not exempt. Respondent and amicus curiae also imply that the court of appeals erred if it did not so hold. We believe that this is an incorrect reading

of the court of appeals' opinion; and, of course, respondent, having failed to file a cross-petition, may not now attack the judgment on the ground that it does not go far enough.

We agree that there may have been some misunderstanding in the court of appeals when government counsel sought to distinguish the name check summaries prepared by the FBI in response to Mr. Ehrlichman's request from attachments to those summaries. It may be that the court of appeals was unaware that some of the name check summaries had simply been photocopies from existing FBI files when the Ehrlichman request was made. As Amicus Clearinghouse correctly notes (Br. 5), the court of appeals did not examine any of the records at issue.[3]

It seems apparent, however, that the court of appeals held only that name check summaries prepared in response to the Ehrlichman request (using information taken from FBI files) failed to meet the Exemption 7 threshold test—not

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[3]It is the government's view that the "attachments," as to which we may seek to prove Exemption 7 status on remand, include all photocopies of FBI file records that existed before the Ehrlichman request and that were attached to the summaries prepared in response to his request. These included copies of both earlier name check summaries and other records from FBI files.

FBI Agent Donohoe explained in his second affidavit (J.A. 18-19) that he had "determine[d] the exact origin of each segment of information being withheld" and that all such "information had been originally obtained by the FBI either 'in an inquiry regarding an individual being considered for appointment to office' or 'to determine if there had been a violation of Federal criminal law and/or to obtain information leading to the arrest and conviction of any person or persons committing any such violation.' " It may be that this brief statement did not fully alert the court of appeals to the fact that some of the name check summaries at issue, which were attached to brief 1969 summaries, had been prepared in earlier years, in response to White House inquiries with respect to appointments, and that the government predicated its Exemption 7 status claim as to these documents on the original reason for their preparation.

that *photocopies* of name check summaries existing in FBI files prior to the Ehrlichman request lost their exempt status by virtue of their *attachment* to new summaries. Thus, the court of appeals took note (Pet. App. 10a) of the district court's finding that, in view of the political context in which the 1969 Ehrlichman request was made, it was not shown "that the information was compiled for law enforcement rather than [for] political purposes." But even if that assumption were true, the name check summaries prepared in response to White House requests in earlier years, as well as the other FBI file records attached to the summaries written in response to the Ehrlichman request, were not prepared in the political context that concerned the district court. And it would appear from the court of appeals' discussion of "attachments" (Pet. App. 20a-22a) that it did not believe that a document that was protected in whole or in part by Exemption 7 would lose its exempt status by virtue of its mere attachment to documents compiled for purposes other than law enforcement. The court of appeals, therefore, remanded for a finding "whether the 'attachments' that were sent to the White House in response to its requests for 'name checks' were the *original documents* from the FBI files compiled prior to the White House requests, and whether they were originally compiled pursuant to a legitimate law enforcement investigation" (*id.* at 21a-22a; emphasis in original, footnote omitted).

5. Finally, contrary to respondent's contention (Br. 15), we are not asking the Court to "create a new privacy exemption," nor (contrary to the assertion of Amicus Clearinghouse (Br. 16)) are we seeking merely the equivalent of a reinstatement of the Exemption 6 claim that the FBI made in its original response to respondent's FOIA request but failed to assert in court.

It may have been unwise to abandon reliance on Exemption 6, but the fact remains that Congress extended stronger protection for personal privacy in Exemption 7(C) by requiring the government to show only that disclosure would produce "an unwarranted invasion of personal privacy" rather than a "clearly unwarranted invasion," as must be shown when invoking Exemption 6. See *Department of the Air Force* v. *Rose*, 425 U.S. 352, 379 n.16 (1976); *Deering Millikin, Inc.* v. *Irving*, 548 F. 2d 1131, 1136 n.7 (4th Cir. 1977). The government believed that it was entitled to have its withholding tested under that less restrictive standard because the material that was responsive to respondent's request and that the FBI wished to withhold was of an investigatory character and had been compiled for law enforcement purposes.[4]

In sum, the government seeks only to assert an Exemption 7 claim that logically applies in this case and that was erroneously rejected by the court of appeals on a simplistic analysis that failed to consider the history and purposes of the FOIA or the strong privacy interests protected by Exemption 7(C). Indeed, as we pointed out in our opening brief (Br. 26), the court of appeals' holding turns Exemption 7(C) on its head: because the district court found the records in this case to be a response to a politically motivated internal government request for information about the personal lives of certain private individuals, those records (although composed of previously exempt, sensitive information) must be made publicly available to anyone who requests to see them. Congress, in enacting Exemption 7, could not have intended such an ironic result.

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[4]We note in addition that Exemption 6 claims have received a grudging treatment in the District of Columbia Circuit because of the strict "similar files" test imposed by that court. See, *e.g.*, *Washington Post Co.* v. *Department of State*, 647 F. 2d 197 (1981), cert. granted, No. 81-535 (Nov. 9, 1981); *Sims* v. *CIA*, 642 F. 2d 562 (1980); *Simpson* v. *Vance*, *supra*; *Board of Trade* v. *CFTC*, 627 F. 2d 392 (1980).

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

DECEMBER 1981

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